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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARY JANE JENKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

FRIERSON M. GRAVES, JR.
Counsel of Record
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

GERALD H. GOLDSTEIN
2900 Tower Life Building
San Antonio, Texas 78205
(512) 226-1463

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

1. Is the Racketeer Influenced and Corrupt Organizations Act ("RICO") definition of "pattern of racketeering activity" void for vagueness, overbroad and unconstitutional as applied to a Defendant engaged in the distribution of material protected by the First Amendment and charged only with predicate acts of dealing in obscene matter so that no restraining order may be issued under the statute.

2. Is the RICO definition of "enterprise" void for vagueness, overbroad and unconstitutional as applied to a Defendant engaged in the distribution of material protected by the First Amendment and charged with predicate acts of dealing in obscene matter so that no restraining order may be issued under the statute.

3. Do the RICO mandatory forfeiture provisions, applicable to Defendant's interest in an enterprise under 1963(a)(2) violate the First Amendment so that no restraining order may be issued directed to all Defendant's interest in ten (10) unindicted bookstores in Alabama, Tennessee, Louisiana, and Abilene, Texas, grossing approximately $4,000,000 annually, a note balance of approximately Four Hundred Thousand Dollars ($400,000) for sale of the bookstores in Houston, Texas, and a home worth approximately $725,000, solely on the basis of an Indictment charging nine (9) allegedly obscene magazines shipped to Houston over a three year period, and display of allegedly obscene video tapes in two (2) bookstore arcades in Houston for four (4) weeks?

4. Do the RICO mandatory forfeiture provisions under 1963(a)(1) and (a)(3), applicable to proceeds and interest and 1963(a)(2) as a source of influence, violate the First Amendment so that no restraining order may be issued directed to Defendant's interest in a residence worth Seven Hundred Twenty-Five Thousand Dollars ($725,000), ten (10) unindicted adult bookstores in

Alabama, Tennessee, Louisiana and Abilene, Texas, and a note balance of approximately Four Hundred Thousand Dollars ($400,000) for the sale of bookstores in Houston, Texas, solely on the basis of an Indictment charging nine (9) alleged obscene magazines shipped to Houston and display of alleged obscene video tapes in two bookstore arcades for four (4) weeks.

LIST OF PARTIES

Petitioner Mary Jane Jenkins and the United States of America as Respondent, are the only parties to this action. None of the other Defendants charged in the Indictment filed a Motion to Dissolve the Restraining Order, although the Court's rulings on forfeiture or the constitutionality of RICO as applied to First Amendment activities would be a benefit to them in any further proceedings in the lower court

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OPINIONS BELOW

The opinion of the Court of Appeals reported as *United States of America v. Mary Jane Jenkins*, 974 F.2d 32 (5th Cir. 1992), is reproduced as Appendix "A" to this Petition. The District Court's opinion and order is not reported and is reproduced as Appendix "B." The unreported Restraining Order of the District Court is reproduced as Appendix "C."

JURISDICTION

The United States Court of Appeals for the Fifth Circuit, issued its opinion in this case on October 5, 1992. Petitioner has filed this Petition within the time permitted by law. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provision and statutes are reproduced as Appendix "D."

United States Constitution, Amendment 1
United States Code:
18 U.S.C. § 1961(1)(4)(5)
18 U.S.C. § 1962(c)(d)
18 U.S.C. § 1963

STATEMENT OF THE CASE

This case presents companion issues to those raised in *Alexander v. United States, cert. granted,* ____ U.S. ____, 112 S. Ct. 3024 (June 29, 1992). At issue in *Alexander* is whether the RICO forfeiture provisions (18 U.S.C. 1963(a)) violate the First Amendment when applied to confiscate all of the property of a chain of bookstores, video stores and theaters on the basis of seven obscene video tapes and magazines.

One issue here presented is whether a restraining order may be issued because of minimum receipts from the sale of nine (9) magazines over a three (3) year period in Houston and display of videos for four (4) weeks in an arcade at two (2) bookstores in Houston in support of the mandatory forfeiture requested under 18 U.S.C. § 1963(a)(2) of all of Defendant's interest as the alleged owner and operator of the ten (10) remaining bookstores in Tennessee, Alabama, Louisiana, and Abilene, Texas, a home in St. Louis, Missouri worth approximately $725,000 and owner of a note with a balance of approximately $400,000 still due on the sale of the four (4) bookstores in Houston and three (3) bookstores elsewhere in January 1989. The restraining order prohibits the transferring, encumbering or selling or otherwise disposing of the assets of all ten (10) remaining bookstores in Memphis, Tennessee (4 bookstores), Kenner, Louisiana (1 bookstore), Birmingham, Alabama (2 bookstores), and Abilene, Texas (1 bookstore), which gross approximately four million dollars ($4,000,000) annually because of a

RICO charge of dealing in obscene matter, where the alleged predicate and racketeering acts occurred only in Houston, Texas. The alleged obscene materials were received and sold or displayed only in the bookstores in Houston. The restraining order also prohibits the receipt of approximately Four Hundred Thousand Dollar ($400,000) still due from the sale of the three (3) bookstores in other cities in Texas and the four (4) bookstores in Houston in January 1989 and disposal of the home or proceeds. The obscenity charges involve nine (9) magazines which would generate sale proceeds of approximately One Hundred Dollars ($100) and arcade proceeds at two (2) of the stores in Houston for four (4) weeks, which proceeds probably amounted to several thousand dollars.

The Motion to Dissolve filed by Petitioner also challenged the Restraining Order because RICO "pattern of racketeering activity" and "enterprise" were void for vagueness and overbroad when applied to a Defendant engaged in the distribution of material protected by the First Amendment and charged under 18 U.S.C. 1962(c). The issues are ripe for determination because the Government has seized funds and has in effect a restraining order in multiple Federal jurisdictions involving adult bookstores operating in Tennessee, Louisiana, Alabama, as well as Abilene, Texas, although all of the obscenity charges in the RICO Indictment relate to the bookstores once owned and operated in Houston, Texas, but sold in 1989 some two years, three months before the Indictment.

The Defendant Jenkins was indicted on April 9, 1991, with five (5) other individual Defendants, on a RICO charge of conducting an enterprise through a pattern of racketeering activity in violation of § 1962(c) and conspiracy under § 1962(d). The Government immediately moved for a Restraining Order which was originally denied by District Judge Lynn Hughes on April 9, 1991. An amended *ex parte* Government's Motion for a Restraining Order (Appendix E) was granted by District Judge Kenneth M. Hoyt on April 10, 1991.

Petitioner moved to dissolve the Restraining Order because the mandatory RICO forfeiture provisions were overbroad and uncon-

stitutional as applied to bookstores engaged in the distribution of material protected by the First Amendment. If the mandatory RICO forfeiture provisions which require forfeiture of Defendant's interest in the entire enterprise violate the First Amendment when applied to protected material after conviction, then the forfeiture provisions are likewise invalid to support a Restraining Order against Defendant and the unindicted corporations operating the ten (10) remaining adult bookstores in other cities and states.

The Court of Appeals and the District Court denied the Motion to Dissolve the Restraining Order. The Court of Appeals noted this Court's decision granting Certiorari in *Alexander* and stated, "Wisdom dictates that we await the Supreme Court's teaching."

The Restraining Order was issued in support of the Government's forfeiture allegations. The Indictment alleges Defendant Jenkins to be in total and exclusive control of the unindicted corporations which the Court of Appeals characterized as alleged to be "an integral part of the criminal enterprise." Pertinent portions of the Indictment are attached as Appendix "F."

The forfeiture allegations seek forfeiture of all of the assets of the sixteen (16) unindicted corporations alleged to be owned by Jenkins, the bank accounts belonging to the various corporations, money seized in the execution of a search warrant in June 1988 of approximately $53,000, Jenkins' automobile and her residence having a value of approximately $725,000. By seeking forfeiture of Defendant Jenkins' interest in the enterprise under § 1963(a)(2), the Government seeks to strip Jenkins of all assets reducing her to a state of poverty. In addition, the Government also seeks proceeds from the sale of the obscene matter under forfeiture Section 1963(a)(1) and (3), as well as any assets which were a source of influence under 1963(a)(2).

Since Defendant Jenkins is alleged as the real owner of all of the assets of the corporations, the forfeiture allegations seek all of the assets of the unindicted corporations operating in other states, not in any way related or connected to the obscenity predicate acts in

Houston. The note for the sale of the four (4) stores in Houston, and three other stores in Texas, had an outstanding balance of approximately $400,000 which was to be paid in weekly payments of $3,850 per week. Said payments under the Restraining Order are therefore denied Defendant.

The obscenity predicate acts and racketeering acts charge nine (9) instances of transportation of obscene material in interstate commerce from either Cleveland, Ohio or Los Angeles, California, to Houston, Texas, and one act dealt with promotion of obscene material under the Texas statute, § 43.23 by sale of four (4) magazines.

The charges against the four (4) bookstores in Houston are the following. Doc Johnson's Arcade received one (1) obscene magazine through interstate commerce in March 1987. Bellair News received four (4) interstate shipments of one obscene magazine each in March 1986, June 1986, November 1986, and July 1987. Diner's News and Arcade News are alleged to have received and displayed in video arcades a number of video tapes during the four (4) week period of June 7-28, 1988. In addition, Diner's News is charged with the promotion of four magazines under the Texas statute by a sale in July 1988. Diner's News is a retail establishment and the retail sale of magazines in Texas does not provide for a penalty in excess of one year and is not a proper racketeering act under RICO. A Motion to Dismiss this racketeering act is pending.

There are no prior convictions alleged in any of the adult bookstores in Houston or in the other bookstores operating in the other states of Tennessee, Alabama and Louisiana. There are no allegations of interstate transportation of obscene material between the bookstores in other states to Houston, or from Houston to the other bookstores alleged to be owned and controlled by Jenkins.

The criminal enterprise charged with conducting a pattern of racketeering (1962(c)) and conspiring (1962(d)) consist not only of Defendant Jenkins and the five (5) individual Co-Defendants, but also the sixteen (16) unindicted corporations allegedly owned and

controlled by Jenkins. These were two foreign holding companies (Mustatara and Jabar, Ltd.) and fourteen (14) domestic corporations alleged to be connected directly or indirectly with the operation of the ten (10) remaining adult bookstores and video stores in Tennessee, Alabama, Louisiana and Abilene, Texas, as well as the stores in Houston, where the obscenity predicate acts took place.

The RICO enterprise and the RICO conspiracy are alleged to have begun in June 1978, prior to the time the RICO statute was extended in 1984 to dealing in obscene matter but no predicate acts are alleged until 1986. Defendant Jenkins had a unique relationship with the United States Government, the Department of Justice and the Internal Revenue Service, which is partially summarized in the Order of March 16, 1981, of the United States District Court, Northern District of Georgia, in *Fidelity Equipment Leasing, et al. v. United States of America*, No. C-78-1118A. The Defendant had purchased approximately nine (9) bookstores from Fidelity over the period 1979 through 1981, with the knowledge of the Internal Revenue Service. The Defendant had been employed at Fidelity and worked under the supervision of the Court and the Internal Revenue Service. Subsequently, in 1982, there was an agreement entered into between the Internal Revenue Service and the Defendant under a power of attorney granted by Jabar, Ltd. and Mustatara Investments, N.V., the foreign corporations listed in the Indictment. Pursuant to this Agreement, the adult bookstores paid the Internal Revenue Service approximately Three Hundred Thirty-Three Thousand Dollars ($333,000) in installments of Twenty-Thousand Dollars ($20,000) per month, with the last payment in October 1983.

Each of the unindicted domestic corporations previously operating in Houston and the unindicted corporations operating the bookstores in other states were separate entities with their own bank account or accounts, in which sales and receipts from the particular adult bookstore were deposited. Accounts payable, salaries, taxes and other expenses were paid from the respective bank accounts of each corporation.

Each separate domestic corporation operating a bookstore or bookstores filed its own Federal corporate income tax return and its own state sales tax and other state tax returns. Federal income tax returns on each corporation listed the stock owned 100% either by Mustatara Investments or Jabar, Ltd. The adult bookstores operating in Houston were all owned by Mustatara Investments. Phoenix & Associates and its predecessors did the accounting and maintained the books of the various corporations, paying their bills from each corporations' bank accounts and performing management functions.

The Court of Appeals in affirming the District Court, refused to rule on Petitioner Jenkins' principal arguments that both RICO substantive prohibitions and its forfeiture and Restraining Order provisions were unconstitutional as applied to those charged with dealing in obscene material. It would not consider the facial challenges without the benefit of a complete record. If this were so, no Motion to Dismiss an Indictment could be granted on constitutional grounds without a trial, conviction and mandatory forfeiture.

The RICO statute does not permit a Court to withhold forfeiture during the appeal of a conviction. The Court of Appeals likewise incorrectly holds that as to allegedly obscene materials, the extent of the constitution's protection may vary depending upon the circumstances. The First Amendment should be uniformly interpreted that the forfeiture provisions of § 1963(a)(2) requiring all untainted interests of a defendant in an enterprise distributing materials protected by the First Amendment to be forfeited is invalid and that the RICO "pattern of racketeering activity" and "enterprise" are void for vagueness as applied to persons engaged in the distribution of material presumed protected by the First Amendment.

The District Court and the Court of Appeals have left intact the Restraining Order to preserve assets which should not be subject to forfeiture because of the unconstitutionality of these provisions as applied to First Amendment activities.

The Government seeks forfeiture of the residence of the Defendant as an interest under 1963(a)(1) or proceeds under (a)(3) or as

a source of influence under 1963(a)(2) as well as an interest in the enterprise under 1963(a)(2). The forfeiture allegations state the United States seeks forfeiture, including but not limited to the Defendant Jenkins' *total interest* in the assets not only in the corporations, but also the residence identified in paragraph 3(E). The residence was purchased on June 30, 1987, for Four Hundred Seventy-Five Thousand Dollars ($475,000). Prior to that time the Indictment alleges only transportation of four (4) obscene magazines, three (3) of which had been sold prior to the home purchase, so that the proceeds would be minuscule. Two (2) allegedly obscene magazines were additionally sold in July 1987, and four (4) under the Texas statute charge of July 1988. In addition, there was in June 1988 four (4) weeks of video arcade receipts in two (2) of the alleged seventeen (17) bookstores operating at the time. All seventeen (17) bookstores sold magazines and videos as well as had arcades. The residence had an outstanding contract of sale in 1992 for Seven Hundred Thirty-Seven Thousand Dollars ($737,000) which has expired.

The sale in January 1989 of the four (4) bookstores in Houston and the three (3) other bookstores in Texas had a sales price of approximately One Million Dollars ($1,000,000). At the time the restraining order was issued there was an outstanding balance due of approximately Four Hundred Thousand Dollars ($400,000) payable in installments of Three Thousand Eight Hundred Fifty Dollars ($3,850) per week. The restraining order prohibited the Defendant and the corporations from receiving such payments. The effect of the restraining order is to seize the Four Hundred Thousand Dollars ($400,000) remaining installment payments on the basis of nine (9) obscene magazines and four (4) weeks of arcade showings of videos in two (2) of the seventeen (17) bookstores, the proceeds of which cannot amount to more than several thousand dollars. This is in addition to the restraints of the disposal of any of the assets of the remaining ten (10) bookstores operating in locations other than Houston, Texas.

REASONS FOR GRANTING THE WRIT

1. THERE IS AN IMPORTANT NEED TO CLARIFY THE DEFINITION OF PATTERN OF RACKETEERING ACTIVITY AS APPLICABLE TO BUSINESSES DISTRIBUTING SEXUAL MATERIAL.

This case presents a First Amendment challenge to the definition of "pattern of racketeering activity." This Court noted in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L.Ed.2d 195 (1989), that the development of limits on the relationship and continuity concepts must await future cases absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope. This First Amendment challenge provides the Court the opportunity to set the outer boundaries of a RICO pattern. This is particularly important because of principles established by this Court concerning the First Amendment which presumed that material consisting of books, videos, films and magazines are protected expression.

Vagueness challenges to RICO since *H.J.* have been outside the First Amendment context. No Defendant had standing to raise the vagueness challenge except as the statute was applied to his or her conduct. The Circuits which have revisited RICO since *H.J.* have construed the hardcore type of RICO conduct involving organized crime or political corruption. In all of these cases, the Courts have determined that the vagueness challenge need only be examined under the facts of the particular case.[1] This is an example of a "future case" envisioned by the Court in which the Court would probe the outer limits of RICO pattern,

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[1] The First, Second, Third, Seventh and Ninth Circuits have all rejected vagueness claims since *H.J.* The conduct, however, related to hardcore organized crime or political corruption type of cases. *U.S. v. Dischner*, 974 F.2d 1502 (9th Cir. 1992); *U.S. v. Van Dorn*, 925 F.2d 1331 (11th Cir. 1991); *U.S. v. Glecier*, 923 F.2d 496 (7th Cir. 1991); *U.S. v. Coiro*, 922 F.2d 1008 (2d Cir. 1991); *U.S. v. Woods*, 915 F.2d 854 (3d Cir. 1990); *U.S. v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990); and *U.S. v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990).

as well as enterprise definition to determine whether or not the definitions are vague as applied to a Defendant charged solely with the distribution of material protected by the First Amendment and the predicate acts relate only to dealing in obscene matter.

The unknown *outer limits* of RICO pattern, when applied to legitimate businesses, distributing videos, magazines and books presumed protected by the First Amendment allows the prosecution and the trial court, not Congress, to legislate the meaning of that element of RICO. Neither this Defendant nor any other Defendant engaged primarily in distribution of material protected by the First Amendment, could anticipate that she was violating the Government's expanded version of RICO or conceivably have known that the few isolated transactions alleged would subject her to the racketeering statute. There is no question that organized crime and political corruption activities have been found within the RICO statute's core. First Amendment activity does not involve core RICO. The vagueness problem is exacerbated by the factors of a lack of a definition of the outer boundaries of the RICO pattern, either by Congress or this Court, and the principles of the First Amendment which presume that materials are protected and not obscene.

While *H.J.* was a civil suit, the allegations were of political corruption which has been held by the Third and Ninth Circuits to be hardcore RICO violations. *U.S. v. Dischner*, 974 F.2d 1502 (9th Cir. 1992), involved repeated soliciting and acceptance of bribes in connection with public contracts. The Court found it was obvious that bribes and kickbacks on public contracts is criminally culpable and that repeated over time such activities feed on themselves so as to become a pattern, no matter what concerns may exist about RICO's reach in other cases. Similarly, decided in the Third Circuit was *U.S. v. Woods*, 915 F.2d 854 (3d Cir. 1990).

The majority in *H.J.* ". . . assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts

involved" (emphasis in original), 109 S. Ct. at 2899-2900. A pattern of racketeering activity requires a prosecutor to prove that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity. *H.J.* defines the test for pattern as "continuity plus relationship." Relationship of predicate acts is established if the criminal acts have the same or similar purposes, results, participants, victim, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

The concurring opinion in *H.J.* also stated that pattern was meant to import some requirement beyond the mere existence of multiple predicate acts. If that were not the case, the concept of pattern would have been unnecessary and the statute could simply have attached liability to multiple acts of racketeering activity. 109 S. Ct. at 109.

When applied to First Amendment activities such as the distribution of videos, books and magazines presumed protected by the First Amendment, RICO does essentially grant unbridled discretion to prosecutors and juries and likewise affords no fair notice of what conduct it prohibits. The Defendants are engaged in the distribution of magazines, books and films which are traditional forms of expression protected by the First Amendment. Not only Defendants, but others, whose expression is constitutionally protected may refrain from exercising those rights for fear of criminal sanctions from a statute susceptible to application to protect expression. The RICO law can be criticized as stated in *U.S. v. Reece*, 92 S. Ct. 214 (1876), which is quoted in *Kolender v. Lawrence*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983), as follows:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

There is no helpful legislative history about adding to racketeering activity the "dealing in obscene matters" nor any legislative history as to what effect the First Amendment has in relation to a pattern of racketeering activity. The initial version of the Comprehensive Crime Control Act of 1984 was introduced by Senator Thurmond on August 4, 1983, as Senate Bill 1762. Senator Jesse Helms on January 30, 1984, proposed the addition of Amendment No. 2682 adding "dealing in obscene matter" to Section 1961(1). This Amendment was accepted by the majority leader and the minority leader of the Senate without objection or argument and was adopted by agreement. Of all of the numerous written reports and studies addressing criminal control bill, there is no discussion of this Amendment. The only comments was a short speech of Senator Helms and his entry into the Congressional Record of magazine articles from the *Los Angeles Times*, *Parade* and *Calendar*, together with a portion of the 1976 report of a task force on Law Enforcement Assistance Administration. There are no reports of any congressional committee on the possible effects or constitutional applications of the adoption of this Amendment. There are at least ten (10) related reports considering various aspects of this crime bill. The Senate Bill, with the Helms as well as all other Amendments was passed by the Senate on February 2, 1984. The House did not consider any crime legislation until September 25, 1984, when Rep. Dan Lundgren moved to send the Fiscal 1985 Continuing Appropriation Resolution No. 648 to the Appropriations Committee to attach House Bill 5963, which was similar to the Senate crime bill and to return the full measure to the House. The funding resolution with the crime bill attached was returned to the House floor and passed the same day and on October 11 the Senate passed House Joint Resolution 648 with the attached crime bill which was signed into law on October 12, 1984, by President Reagan.

The Act is entitled "Continuing Appropriations, 1985 - Comprehensive Crime Control Act of 1984" and is Public Law 98-

473. The entire Act is 363 pages in the *U.S. Code Congressional and Administrative News*. The Committee Reports total over 500 pages. In none of them is there any consideration, discussion or explanation of the implications of adding obscenity as a RICO predicate offense.

This Court in *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S. Ct. 916 (1989), held a pre-trial seizure invalid even though the bookstore had 39 prior criminal convictions for obscenity. The elements of a RICO violation other than predicate acts, remain to be established which were that these violations by the corporations and employees established a pattern of racketeering activity. *See*, 109 S. Ct. at 929. *H.J.* holds that the concept of pattern must have meaning since the statute did not simply attached liability to multiple acts of racketeering activity. We asked the Court to consider the vagueness challenge as applied to a Defendant engaged normally in the distribution of material presumed protected by the First Amendment.

If RICO pattern of racketeering activity is unconstitutionally vague as applied to this Defendant, the restraining order must fall. The test of continuity and relationship established by the Court in *H.J.* does not solve the vagueness problem for a Defendant whose primary activity is the operation of a theater or a bookstore which sells magazines and videos, rents videos, and displays videos in arcades within the bookstores.

A. The Continuity Requirement of Pattern is Vague When Applied to First Amendment Activities and is in Conflict with First Amendment Decisions in Many Circuits.

The natural, legitimate and legal purpose of a bookstore, video store or motion picture theater is the distribution of books, films, videos and magazines which are presumed to be protected by the First Amendment and not obscene.

There is something to a RICO pattern beyond simply the number of predicate acts involved. Pattern is impermissibly

vague for First Amendment activities when based on the test that continuity over a closed period of time is established by proving a series of related predicates or the threat of continuity is established. First Amendment principles have established that each and every video, film or magazine must be judged individually. Films or magazines may contain similar sexual conduct but each is still presumed to be protected and not obscene. There can be no continuity. Since each and every book, magazine, motion picture or video is judged individually, the distribution of one sexually explicit and obscene item does not pose a threat of continued activity. The same sexual acts in one video or magazine may be held not obscene and protected and in another video or magazine may be held to be obscene. Different juries may reach different results on the same film or magazine. The application of local contemporary community standards may have different verdicts in different locations. *See, Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). The fact that one video or magazine may be charged or even found obscene does not establish the threat of continuity because the bookstore remains in the distribution business. Continuity is vague because this Court and numerous circuits and district courts have established that it cannot be presumed that unnamed films or magazines distributed in the future will be obscene.[2]

Even if a single copy of a film may be seized for evidence in a criminal proceeding, the continued exhibition of such film

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[2] Among the many cases which reject an injunction against the exhibition of future unnamed films because of past obscene films are *Parish of Jefferson v. Bayou Landing, Ltd.*, 350 So. 2d 158 (La. 1977); *News Mart, Inc. v. State ex rel Webster*, 561 S.W.2d 752 (Tenn. 1978); *Ranck v. Bonal Enterprises, Inc.*, 467 Pa. 569, 359 A.2d 748 (Pa. 1976); *Fehlhaber v. North Carolina*, 445 F.Supp. 130 (E.D. N.C. 1978); *Mitchem v. State ex rel Schaub*, 250 So. 2d 883 (Fla. 1971); *State ex rel Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *New Riviera Arts Theater v. State ex rel Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967); and *Busch v. Projection Room Theater*, 130 Cal.Rep. 328, 550 P.2d 600 (1976), *cert. denied*, 429 U.S. 922, 97 S. Ct. 320 (1976).

cannot be restrained by seizing all available copies of it. Publications may not be taken out of circulation until there has been determination of obscenity. The exhibitor or distributor therefore has the option to continue distribution because there has been no determination of obscenity. *See, Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L.Ed.2d 745 (1973); and *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S. Ct. 1610, 89 L.Ed.2d 871 (1986).

A business primarily engaged in First Amendment activities of distribution or exhibition must be construed as a pattern of *legal* protected activity, and not a pattern of *illegal* activity. Engaging in bribery or political corruption or the numerous other illegal acts that may be a course of business of a legal entity and held to be core RICO activities are not analogous.

Among the decisions rejecting injunction for future films based on past obscenity is *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L.Ed.2d 413 (1980), affirming *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (1978).

The reasoning of the Fifth Circuit rejected continuity as applied to First Amendment activities. The listing of forbidden sexual acts or acrobatics in an injunction merely begs the question for few people have the omnipotence to determine the advance of a final judicial ruling whether a film is legally obscene. 587 F.2d at 169.

The principle stated by this Court in *Vance*, 100 S. Ct. 1156 at 1159, note 3, is appropriate when considering the vagueness of the continuity test of pattern. The State of Texas, just as the RICO statute, made the mistake of prohibiting future conduct protected by the First Amendment after a finding of undesirable present conduct.

> When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be

'dim and uncertain.' *Bantam Books v. Sullivan*, 372 U.S. 58 at 66,

100 S. Ct. at 1159, n.3.

As this Court recognized in *Ft. Wayne Books v. Indiana*, the state cannot escape the constitutional safeguards of prior cases by merely recategorizing a pattern of obscene violations as racketeering.

It cannot be fair notice to the Defendant that any distribution of materials presumed protected by the First Amendment meets the continuity requirement of pattern merely because the material distributed in the past or to be distributed in the future has sexual content.

B. The Relationship Requirement of Pattern is Vague as Applied to First Amendment Activities.

The relationship test is that the pattern embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *See, H.J.*, 109 S. Ct. at 2901. The cases construing relationship have involved political corruption with bribery or kickback schemes, loan sharking and gambling, drug distribution, murder, arson, kidnapping and similar crimes.

There is no criminal *purpose* to the distribution of films or magazines presumed protected by the First Amendment unless the purpose is to sell the magazines or films for money. The *results* are not related such as acts of bribery or arson or some other *core* criminal activity, but the results are that one or more particular magazines or films are found to violate local contemporary community standards and are obscene.

Participants is likewise vague. The participants are not common to one another. One may be a publisher of a magazine and another may be a producer of a video. There may be a number of videos or a number of magazines with each having

different producers or publishers. There may be the same or different national distributors. The magazines or films may be sold from the same stores or from different stores. The expressive material may be sold or rented by different clerks. They may be ordered by different clerks or different persons.

There are no *victims*, obscenity is considered a victimless crime. The *methods of commission* are vague. Is it the sale or rental of a video or the sale of a magazine? Is it the display of a video in an arcade? Is it restricted to the same publisher or same video producer? Is the relationship satisfied by the sale or rental by the same bookstore or of related bookstores under the same corporate or individual ownership? Is the display in a theater the same method as a sale in a bookstore? There are so many questions that the sale or distribution of material protected by the First Amendment is too vague to come under the *relationship* definition established by the Court.

The distribution of material presumed protected by the First Amendment is beyond the outer limits of RICO. The RICO statute needs to be construed by the Court and declared unconstitutional as applied to persons operating under the First Amendment who are charged under the RICO statute as "dealing in obscene matter."

C. Enterprise is Vague or Overbroad and Must Be Restricted.

This Court, in 1981, before RICO was extended to dealing in obscene matter, determined the scope of enterprise in *U.S. v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981). As used in RICO, "enterprise" encompasses both legitimate and illegitimate enterprises. However, the Court explained that while a wholly criminal enterprise comes within the ambit of the statute it did not mean that a "pattern of racketeering activity" is an enterprise. The Government must prove both the existence of an enterprise and the connected pattern of racketeering activity. The enterprise is an entity. In *Turkette*, "enterprise" was an association in fact to distribute drugs. The association in fact

must be for a common purpose of engaging in a course of conduct. "Pattern of racketeering" is, on the other hand, a series of criminal acts as defined by the statute. Importantly, the Court said:

> The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.
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> 101 S. Ct. at 2529.

Interpretation problems arise in connection with First Amendment activities when a group of persons are charged under Section 1962(c) of conducting or participating in an enterprise through a pattern of racketeering activities.

The Seventh Circuit in *U.S. v. Masters*, 924 F.2d 1362 (7th Cir. 1991), discussed the difficult issue of an enterprise. The difficulty is exacerbated in a First Amendment case. *Masters* stated:

> The most difficult issue relating to enterprise and pattern in this case is whether the two are separate. If the 'enterprise' is just a name for the crimes, the defendants commit, or for their agreement to commit these crimes that was charged separately in the conspiracy count, then it would not be an enterprise within the meaning of the statute. *U.S. v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981); *U.S. v. Neopolitan*, 791 F.2d 489, 500 (7th Cir.

1986). Otherwise, two statutory elements - enterprise and pattern - would be collapsed into one.

924 F.2d at 1367.

The Petitioner, those alleged to be associated with her, and the unindicted corporations are all alleged to be *in the business of distributing material presumed protected by the First Amendment.* There is no *separate* ongoing organization which has as its business the distribution of sexually explicit material *which is obscene* as opposed to First Amendment material which may be sexually explicit and protected. Enterprise as applied to First Amendment activities is either vague or it is overbroad.

The vagueness of enterprise is explained by a former Chief of the Criminal Division of the U.S. Attorney's office for the Southern District of New York, who wrote in the *Columbia Law Review*, the following:

> The abstraction of the RICO enterprise enables the prosecution to define as an entity, whatever subset of a criminal organization they uncover, or to lump into a single enterprise a variety of criminal schemes that center on a particular individual or group.
>
> Lynch, *RICO: the Crime of Being a Criminal*, 87 Colum.L.Rev. 661, 965, note 196 (1987).

Persons engaged in the distribution of material protected by the First Amendment cannot know when that entity or some members became a criminal enterprise. There are no guidelines or standards applicable to First Amendment activities for a distributor or retailer or for prosecutors. The statute was not originally designed for nor can it be appropriately applied to First Amendment activities. This Court should determine the limits of the enterprise definitions.

If the Court should determine that a RICO enterprise can be applied to First Amendment activities, the enterprise must be

restricted to comply with the First Amendment principle of local community standards. This Court determined in *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974), that the jury can draw on its knowledge of the community from which it comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case. The fact that distributors of allegedly obscene material may be subjected to varying community standards in the various judicial districts into which they transmit the materials, does not render the Federal statute unconstitutional. 94 S. Ct. at 2902. An example of the application of the local standard rule is *U.S. v. Elkins*, 396 F. Supp. 314 (C.D. Cal. 1975), wherein an indictment was dismissed. The alleged obscene material was distributed in Iowa. The Court determined that expert testimony as to community standards would not provide a proper basis on which the California jury could determine obscenity in that a special and integral part of the knowledge of the jurors comes into play in deciding which conclusion the average person applying contemporary community standards would reach in a given case. Expert testimony is permissible only to assist a jury in determining community standards. The Court concluded a jury from the California district could not determine the community standards of the Northern District of Iowa by reason that none of the California jurors possessed the knowledge of a juror in Iowa of the community standards.

Similarly, in *U.S. v. Mohney*, 476 F. Supp. 421 (Hawaii 1979), the Court dismissed an obscenity indictment. The *Mohney* court found *Hamling* did not indicate which standard would be used if the Government had the choice of bringing the action in either the district of transmission or the district of receipt and chose to bring the obscenity charge in the district of transmission. *Mohney* held it would be senseless to allow the community where the materials were transmitted to make the obscenity determination, but force that community to use the standards of the community where the material was distributed. The Court stated:

> Inherent in *Miller* and *Hamling* is the idea that jurors are drawing on personal knowledge of their own community. While expert opinions may be relevant, juries are completely free to disregard all expert testimony. If jurors cannot draw on personal knowledge, the idea of local community standards is a *totally* useless concept. (Emphasis in original)
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> 476 F. Supp. at 426-427.

Finally, the Sixth Circuit in *U.S. v. Peraino*, 645 F.2d 548 (6th Cir. 1981), found there was serious doubt that a jury of one district could properly determine the standards of another community solely on the basis of expert testimony, citing *Hamling*, 94 S. Ct. at 2924, n.5 (dissenting opinion). Citing *Elkins* and *Mohney*, the *Peraino* Court found that local standards establish the inherent difficulties of attempting to prosecute national conspiracies under a Federal obscenity statute in a single district. *See* 645 F.2d at 553.

Petitioner would concede that a national distributor, sending materials to Houston, Texas, for example, may be charged as part of an enterprise in Houston, but there would be limits on forfeiture as discussed herein. However, if there were regional distributors, who distributed the same material in other Federal districts or retail stores who sold or distributed the material in other Federal districts, these could not be part of the enterprise for the RICO crime or for RICO forfeiture allegations. A defendant or defendants must have activities in the particular judicial district in which the predicate obscenity charge is brought.

An enterprise must be restricted to those Defendants connected with the local standards and not be used as a multi-district conspiracy or to avoid multi-district obscenity charges. The enterprise for purposes of RICO or for RICO forfeiture, must be restricted under the First Amendment to comply with the local standard rule.

2. THE EXTENT OF PERMISSIBLE FORFEITURE UNDER RICO MANDATORY FORFEITURE PROVISIONS NEEDS TO BE CLARIFIED FOR FIRST AMENDMENT ACTIVITIES.

The RICO statute originally had two provisions relating to forfeitures which were construed by this Court in *Russello v. United States*, 464 U.S. 16, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983). Because of interpretations within the Circuits limiting its application, a new subsection 3 was prepared by Congress, while *Russello* was under review and enacted in 1984. This Court determined in *Russello* that interest under subsection (a)(1) acquired in violation of Section 1962, included proceeds or profits. It was distinct from interest in an enterprise under subsection (a)(2). The Court determined there are things forfeitable under one but not the other of the two subsections. The Amendment in 1984 preserved the existing language, but added a specific reference to proceeds in subsection 3, under what was deemed the better approach. The ambiguity regarding forfeiture of proceeds was resolved yet the body of case law interpreting the existing provisions of the RICO forfeiture statute was retained. The Department of Justice, the legislative history states, concurred in this judgment.

The Defendant in this cause has forfeiture allegations which request forfeiture of all of the property of Defendant under all of these provisions. There is a need to clarify the interpretation of the forfeiture provisions as applied to a Defendant engaged primarily in the distribution of First Amendment and who is charged under RICO where the predicate acts are solely dealing in obscene matter.

A. Forfeiture of all Interest in the Enterprise under 1963(a)(2) is Invalid.

This Court has recognized the significance of the Constitutional issue inherent in mandatory RICO forfeitures as applied to obscenity offenses when it granted certiorari in *Alexander v.*

United States, ____ U.S. ____, 112 S. Ct. 3024 (June 29, 1992). This Defendant cannot emphasize the unanimity of the Circuits and the all inclusiveness of the holdings of blanket forfeitures of all interest of the Defendant in the enterprise in the application of 1963(a)(2). This Court in *Russello* held that interest in the enterprise itself need not have been "illegally acquired."

The cases are unanimous that forfeiture is not limited under 1963(a)(2) to assets of a RICO enterprise that are tainted by use in connection with the racketeering activity, but extend to the convicted person's entire interest in the enterprise. *U.S. v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *U.S. v. Feldman*, 853 F.2d 648 (9th Cir. 1988); and *U.S. v. Horak*, 833 F.2d 1235 (7th Cir. 1987), are among those decisions which also recognized the possibility of 8th amendment violation. Forfeitures is mandatory regardless of its harshness. *U.S. v. Hess*, 691 F.2d 188 (4th Cir. 1982). A jury may not find that less than the full amount of the Defendant's interest in an enterprise is subject to forfeiture because Section 1963 is mandatory. *U.S. v. Cauble*, 706 F.2d 1322 (5th Cir. 1983). Differentiating between those parts of RICO enterprise engaged in racketeering activity and those that are not is not a requirement under the statute for determining whether a Defendant's interest is subject to forfeiture. *U.S. v. Walsh*, 700 F.2d 846 (2d Cir. 1983).

Section 1963(c) was amended in 1984 to include the relationback theory. Whether assets are tainted or untainted, Section 1963(c) provides that all right, title and interest in property described in 1963(a) vests in the United States upon the commission of the act giving rise to the forfeiture. The relationback theory provides the forfeiture takes effect immediately upon the commission of the act and would apply to property which is not obscene and which is protected or presumed protected by the First Amendment.

The theory of forfeiture of property is described in the early case of *United States v. Stowell*, 133 U.S. 1, 33 L.Ed. 555 (1890) as follows:

> By the settled doctrine of this Court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect *immediately* upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a *statutory transfer of the right to the United States at the time the offense is committed*, and the condemnation, when obtained, *relates back* to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." (Emphasis supplied)

The RICO statute is not only the forfeiture of protected expression, but has the effect of a pre-trial seizure by vesting in the United States by a statutory transfer of all of the assets, whether protected or not, which are alleged as part of the enterprise in the forfeiture allegations. The Indictment gives notice to the world that without any adjudication of obscenity, but because of an allegation of a few videos or magazines, all protected materials have been statutorily transferred to the United States subject to judicial condemnation.

In personam forfeiture of all assets of the Defendant in an enterprise as a method of assault upon First Amendment values should not be permitted.

B. Forfeiture of Assets as a Source of Influence under 1963(a)(2) Conflicts with Decisions that Forfeiture or Seizure Violates First Amendment Principles.

Various Circuits have recognized the rule of proportionality as regards the forfeiture of property as a "source of influence over a racketeering enterprise." *U.S. v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989); *U.S. v. Anguilo*, 897 F.2d 1169 (1st Cir. 1990); *U.S. v. McKeithen*, 822 F.2d 310 (2d Cir. 1987); and *U.S. v. Zielie*, 734 F.2d 1447 (11th Cir. 1984).

Even applying a rule of proportionality, the RICO provisions for forfeiture of property as a source of influence violates First Amendment principles established almost universally by prior court decisions. *Anguilo* interpreted profits or proceeds and property affording an influence as being subject to forfeiture to the extent they are "tainted" by the racketeering activity. *See*, 897 F.2d at 1212. Under this test it was found that Cafe Pompeii afforded Defendants a source of influence over the enterprise and this real property was forfeitable since Defendants held meetings there. The cafe was used to further the affairs of the enterprise. This is contrary to First Amendment principles which would not allow forfeiture of projectors, bookshelves, theater seats, cash registers and other property simply because something obscene was once on the shelves, shown in the theater or the cash proceeds for the sale of the obscene item was put in the cash register. Likewise, in *McKeithen*, cited to support RICO forfeitures, it was determined that property affording a source of influence should be interpreted to mean property "used or intended to be used, in any manner or part, to commit or facilitate the commission of the proscribed violations." *See* 822 F.2d at 314. Even using the proportionality argument, the jury in *McKeithen* found that forty-three percent (43%) of an apartment property was to be forfeited.

In *Zielie*, which involved drugs, the forfeiture was ordered as a source of influence of several parcels of real property which were used almost exclusively as money counting houses or stash houses. *See* 734 F.2d at 1459.

It must be remembered that the original RICO statute was adopted in 1970. All of the legislative history was dedicated to the discussion of the use of forfeitures against criminal acts, including organized crime as established in the 1970 statute. RICO was not extended to dealing in obscene matter until 1984. There is no legislative history as to the interpretation of forfeitures as applied to First Amendment activities. *United States v. Martino*, 681 F.2d 952 at 961 (1982), stated as to RICO forfeitures:

> We acknowledge that its breadth supplies a potential for great abuse. The harshness of the statute's impact, however, cannot dictate the proper construction of its provisions. Congress was aware of the far reaching measures it was enacting to deal with the unprecedented problem of organized crime.

Martino was affirmed by this Court as *Russello, supra.* At the same time that the Courts were construing "source of influence" under RICO, the Courts were deciding issues under the First Amendment to return projectors and other property which now create conflicts. For example, the Fifth Circuit in *Universal Amusement Company v. Vance*, 559 F.2d 1286, *aff'd. en banc*, 587 F.2d 176, held the seizure of motion picture projectors at the time there were seizures of films from the theater was harassment and prosecution in bad faith. The state of Texas did not appeal. It did appeal an injunctive-type procedure which was part of the same case. This Court affirmed in *Universal Amusement Co. v. Vance*, 445 U.S. 308, 100 S. Ct. 1156, 63 L.Ed.2d 413.

In *United States v. Polak*, 312 F. Supp. 112 (E.D. Pa. 1970), the Court ordered return of the Defendant's personal property and ruled that seizures of such instrumentalities as postage meter machines, addressoplates and envelopes on the grounds that these items or instrumentalities are evidence of a crime charged in the Indictment was impermissible not only before trial, but even after a final determination of obscenity, citing *Near v. Minnesota*, 283 U.S. 697 (1931). The language of the District Court is most appropriate in considering the seizing of property either as an *interest* in an enterprise or as a *source of influence* when the Court stated:

> If the Government's argument on this point is accepted, they would be permitted to seize and retain the printing presses of a large metropolitan newspaper if a single commercial advertisement printed in the newspaper were deter-

> mined to be obscene. The next step would be to seize a television network on the ground, perhaps, that its instrumentalities were used in connection with the dissemination of an obscene film. The scope of the power asserted is almost limitless. To permit the Government by this device to seize the very instrumentalities of speech would affect a much more drastic suppression of the opportunities of expression than any of the prior restraints which have been heretofore considered and condemned by the United States Supreme Court.
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> 312 F. Supp. at 116.

The same language could be paraphrased to the forfeiture as a source of influence of bookshelves, television screens, televisions or VCR's, theater seats, buildings used to house bookstores or theaters, homes where people could allegedly meet on First Amendment activities found to be obscene, as well as the seizure of newspaper and printing equipment, television networks or the shares of stock or interest of parties in such facilities because it is asserted that such facilities were a "source of influence" if not already forfeited as the Defendant's "interest" in the enterprise under 1963(a)(2).

Likewise, in *State v. A Motion Picture Entitled "The Bet"*, 219 Ka. 64, 547 P.2d 760 (1976), the Kansas Supreme Court following First Amendment principles found there was a difference when property had been used to further illegal activities in the areas of gambling, prostitution or drug trafficking and can be legally destroyed so as not to offend again. The regulation of expression, however, has the effect of imposing prior restraints. In this sensitive field, the State may not employ means that broadly stifle fundamental personal rights where the end can be more narrowly achieved. In other civil and criminal obscenity cases, the Courts have unanimously held that the state may not

seize or forfeit personal property such as shelves and projectors used to disseminate obscene material.[3]

Not only does the First Amendment prohibit the seizing of the Defendant's entire interest in an enterprise, but the "source of influence" provisions of RICO must be construed to prohibit forfeiture of any neutral property such as projectors, theater seats, bookshelves, theater buildings. The only thing subject to forfeiture under RICO is the "tainted" property, which is the proceeds from the particular obscene material under 1963(a)(1) and (3).

The conflict between First Amendment principles and the RICO forfeiture provision requiring forfeiture of all property which is "a source of influence" needs to be resolved in favor of First Amendment principles.

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[3] *State v. Feld*, 155 Ariz. 88, 745 P.2d 146, 155 (Ariz. App. 1987), *cert. denied*, 485 U.S. 977 (1988) (RICO forfeiture provisions unconstitutional as applied in obscenity case to authorize post-conviction forfeiture of "bookshelves, cash registers, or similar items" used for protected speech activities); *Maguin v. Miller*, 433 F. Supp. 223, 230 (D. Kan. 1977) (enjoining seizure of "property necessary for the operation of theaters," as such seizures would "constitute an impermissible prior restraint"); *Bongiovanni v. Hogan*, 309 F. Supp. 1364, 1366 (S.D.N.Y. 1970) (enjoining forfeiture of projection equipment, citing *Near*); *G.I. Distributors, Inc. v. Murphy*, 336 F. Supp. 1036, 1038-1039 (S.D.N.Y. 1972) (ordering return of "items required in the conduct of" bookstore, on grounds that seizure "effectively prevented" distribution of other, constitutionally protected materials); *Star Distributors, Ltd. v. Hogan*, 337 F. Supp. 1362, 1364 (S.D.N.Y. 1972) (ordering return of property the seizure of which "worked a complete and total restraint" on publisher's lawful First Amendment activities and "deprived the public of an opportunity to receive its non-obscene publications"); *Porno, Inc. v. Municipal Court*, 33 Cal.App.3d 122, 126, 108 Cal.Rptr. 797, 800 (1973) (ordering return of projectors on prior restraint grounds); *Europo Books, Inc. v. Pomerleau*, 395 A.2d 1195, 1198 (Md. 1979) (enjoining practice of seizing projectors on theory that this was as invalid a prior restraint as "to seize the printing presses because the newspaper contains patently obscene matter"); *Ellwest Stereo Theatre, Inc. v. Byrd*, reported *sub nom. Universal Amusement Co. Inc. v. Vance*, 404 F. Supp. 33, 51, 54-57 (S.D. Tex. 1975) (seizure of projectors based on probate obscenity constituted bad faith harassment).

C. Forfeiture of Assets as an Interest under 1963(a)(1) or Proceeds Under 1963(a)(3) Must be Limited so as not to Violate First Amendment Principles.

Interest, which this Court has construed to be proceeds in *Russello* and proceeds as enacted in (a)(3), must be narrowly construed and limited when applied to First Amendment activities. This Court has determined that community standards will vary throughout the nation which serves the principle of the First Amendment. There is no national community standards and instead Federal prosecutions for transportation of allegedly obscene materials in interstate commerce must be tested by local contemporary community standards. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

The result is that there may be prosecutions in Houston, Texas for obscenity under local community standards, though the community from which it was sent would accept or tolerate the same material. Material is entitled to First Amendment protection except where it violates community standards. A classic example is "*Deep Throat.*" It may be illegal in one jurisdiction. However, in other communities it may have been construed as protected or never even bothered and therefore presumed to be legal. The District Court in Dallas in *U.S. v. California Publishers Liquidating Corp.*, 778 F. Supp. 1377 (N.D. Tex. 1991), which is on appeal to the Fifth Circuit, applied this concept to a similar forfeiture procedure in 18 U.S.C. § 1467(a)(2), as to property constituting gross profits or other proceeds. That Court correctly determined that only the proceeds from the sale of the obscene material in the Dallas area were subject to forfeiture. The obscene video tapes were presumed to be not obscene in all other parts of the country so proceeds from their sale in any other areas cannot be deemed to be proceeds obtained from an offense under the Federal obscenity statute.

The same would be applicable to a Defendant if this Court determined the Defendant could be properly charged under RICO and found guilty using obscenity predicates. It was undisputed by *Alexander* in his Brief to the Court that proceeds from the sale of specified materials determined to be obscene would be forfeitable. This would be correct as to the proceeds from the sale in that *particular district*. For example, if the classic film "*Deep Throat*" were found obscene in Houston, the proceeds from all the distributions in the Houston area could be ordered forfeited. However, proceeds from distributions in any other areas of the nation could not be ordered forfeited. This would be particularly appropriate for a national distributor of First Amendment material. The United States could not select a venue in which it believed the material would be obscene and then request forfeiture of the proceeds from that obscene material nationwide. Even under the proceeds section of RICO forfeiture, the First Amendment requires the Court limit any forfeiture to the proceeds of the obscene material only in that particular local jurisdiction.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully urges the Court to grant a Writ of Certiorari and clarify the application of RICO to First Amendment activities.

Respectfully submitted,

Frierson M. Graves, Jr.
Counsel of Record
2000 First Tennessee Bldg.
Memphis, Tennessee 38103
(901) 526-2000

Gerald H. Goldstein
2900 Tower Life Bldg.
San Antonio, Texas 78205
(512) 226-1463